No. 11295.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANCIS P. O'LEARY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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APPELLEE'S REPLY BRIEF.

Statement of Facts.

Appellee believes it will be helpful to make a brief statement of the pertinent facts of this case.

Captain Austin Stuart Fithian, a man of about 30 years of age, skipper of the merchant steamship "Arthur R. Lewis", a vessel belonging to the United States, met his death by reason of gunshot wounds on the night of December 9, 1945, at about the hour of 9:00 P. M. The homicide occurred when the vessel "Arthur R. Lewis" was anchored in the waters of Seadler Harbor near Manus Island, an island of the Admiralty group in the Southwest Pacific. The vessel had sailed from Norfolk, Virginia through the Panama Canal across the waters of the South Pacific, and it came to anchor at about 3:00

P. M. of the afternoon of December 9, 1945. The defendant, Francis P. O'Leary, was the first mate of said vessel.

There is hardly any question as to the cause of the death of Captain Fithian, namely, that of gunshot wounds. His demise was almost instantaneous. Six bullet wounds were found in various parts of his body. [R. 78.]

The evidence was all circumstantial.

Within a matter of less than one minute after the volley of bullets was heard by certain witnesses (one witness timed it as 20 to 30 seconds), the defendant was observed to be standing in the open doorway of the Captain's office. [R. 57 and 58.] The Captain's office was located on the bridge deck, or the top cabin deck of the vessel. The door leading to the Captain's office was open. [See diagram, Government's Ex. No. 1, R. 37.] Within twenty to thirty seconds after the first volley of shots were heard, by at least one witness, the defendant, while standing in the open doorway leading into the Captain's office facing inward, was heard to have made this remark "This will hold you for a while." [R. 57 and 58.] One other witness confirmed the fact that the defendant was seen within a few seconds after the last volley of shots were heard, in the passageway immediately adjacent to the open door of the Captain's office. [R. 92.]

Plaintiff's Exhibit No. 1, a photostatic copy [R. 37] is a diagram similar to the bridge deck of the vessel involved and displays a deck plan drawing of an office

similar to the Captain's office of this ship. The letter "B" is the point where the defendant was first seen by at least one witness within a matter of twenty or thirty seconds after the first volley of shots were fired.

The trial was relatively short, lasting less than three days. The defendant availed himself of his constitutional right and did not take the stand. No witnesses were called on behalf of the defendant.

Very few objections were interposed to the evidence offered, the more significant of which and upon which this appeal is based is that of the sufficiency or insufficiency of the evidence.

The government did not ask for the death penalty. There is no question but that the defendant was under the influence of intoxicants both prior to and as of the time of the shooting. The defendant was found guilty of voluntary manslaughter.

Jurisdiction of the District Court.

Starting on page 2 of Appellant's Opening Brief, there appears a discussion of jurisdiction of the District Court to try this offense; no contention being urged that the Court did not have such jurisdiction. Appellee merely calls attention to the authorities cited by the appellant and in particular, Title 18, U. S. C., Section 451, which section confers jurisdiction upon the District Court when an offense, such as this, is committed upon the high seas or out of the jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof.

I.

The Sole Question Presented Is the Sufficiency or Insufficiency of the Evidence.

The defense at or after the trial made several motions; they may be summarized as follows:

(1) Insufficiency of the evidence to submit the case to the jury;

(2) A motion for a directed verdict, because of the urged insufficiency of the evidence;

(3) A request for an instruction to find the defendant not guilty, which instruction the Court refused;

(4) A motion for new trial based on an alleged insufficiency of the evidence.

Said motions were made under somewhat different grounds than above set forth, but the above substantially covers the motions made.

Thus, the case comes to this Court primarily upon one issue, namely: whether there was sufficient evidence to sustain the jury's verdict. If there was not sufficient evidence, then of course, all motions urged by the defense should have been granted.

Appellee respectfully submits that the facts of this case present a jury question and that the verdict should not be set aside.

II.

Well Settled Principles Governing Appeals.

The cases that will be cited under this heading set forth well settled principles or rules pertaining to appeals. They are not cited with the idea of calling to this Court's attention any novel or unique rules of law, but rather to set forth, as a matter of convenience, authorities of established principles enunciated in such cases. Such principles are as follows:

A. Appellate Courts Will Indulge All Reasonable Presumptions in Favor of the Trial Court.

Appellate Courts will consider the evidence most favorable to the prosecution and will indulge all reasonable presumptions in support of Trial Courts' rulings and draw all inferences permissible from the record in determining whether evidence is sufficient to sustain a conviction.

The above familiar principle has recently been reiterated by this Circuit in the case of

Henderson v. U. S. (C. C. A. 9th), 143 F. (2d) 681.

The above case furthermore sets forth the principle that proof to establish guilt need not exclude all doubt, but it is sufficient if it reaches that degree of probability where the general experience of men suggests it passed the mark of reasonable doubt.

B. Appellate Courts Will Rarely Substitute Its Views on the Weight of the Evidence for Those of the Jury.

The fact that the Appellate Court might have reached a different conclusion from that of the jury on certain questions involved will not justify the Appellate Court in substituting its views on the weight of the evidence for those of the jury. This principle is enunciated in the case of

Jordan v. U. S. (C. A. D. C.), 87 F. (2d) 64, p. 67.

The last mentioned case is a *homicide* case involving a killing during the commission of a robbery. The question involved was whether the defendant fired purposely or not. The principle above noted is supported by the Opinion.

C. Rule Applicable on a Motion for a Directed Verdict.

This Circuit has announced that on a motion for directed verdict the issue of the defendant's guilt should be submitted to the jury if there is any "proper", "legal", "competent" or "substantial" evidence sustaining the charge. See

Maugeri v. U. S. (C. C. A. 9th), 80 F. (2d) 199, p. 202:

> "As to the requests for a directed verdict, it is well settled that, on motion for a directed verdict for the defendant in a criminal case, if there is any 'proper', 'legal', 'competent', or 'substantial' evidence sustaining the charge, it should be submitted to the jury."

To the same effect,

Gorin v. U. S. (C. C. A. 9th), 111 F. (2d) 712, p. 721, affirmed 312 U. S. 19.

It is well settled that where a motion for a directed verdict is made, the Appellate Courts must view the evidence in the light most favorable to the appellee. This Circuit has so ruled.

See:

Borgia v. U. S. (C. C. A. 9th), 78 F. (2d) 550, at p. 555; cert. den. 296 U. S. 615.

In the last mentioned case, like the instant case, the evidence was wholly circumstantial.

See, also:

Morton v. U. S. (C. A. D. C.), 147 F. (2d) 28 (a homicide case).

D. The Sufficiency of the Evidence Is a Jury Question.

This Circuit has clearly set forth the rule governing Appellate Courts on the question of the sufficiency or insufficiency of the evidence. A fairly recent case on this proposition is that of

Hemphill v. U. S. (C. C. A. 9th), 120 F. (2d) 115, cert. den. 314 U. S. 627.

On page 117 appears the following:

"In an Appellate Court, the question of the sufficiency of the evidence is a question of law, 'which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only

to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict.' Abrams v. United States, 250 U. S. 616, 619, 40 S. Ct. 17, 18, 63 L. Ed. 1173. It is well settled that 'if there is any "proper", "legal", "competent", or "substantial" evidence sustaining the charge (the case), should be submitted to the jury.' Mageri v. United States, 9 Cir., 80 F. 2d 199, 202. Again, it has been said, 'The duty of this court is "but to declare whether the jury had the right to pass on what evidence there was." Felder v. United States (2 Cir.), 9 F. (2d) 872, 875, certiorari denied 270 U. S. 648, 46 S. Ct. 348, 70 L. Ed. 779. There being substantial evidence in support of (the) charges, the court would have erred if it had peremptorily directed an acquittal upon * * * the counts. Pierce v. United States, 252 U. S. 239, 251, 40 S. Ct. 205, 64 L. Ed. 542.' Crono v. United States, 9 Cir., 59 F. 2d 339, 340. See, also, Cossack v. United States, 9 Cir., 82 F. 2d 214. Moreover, in the consideration of such question, the appellate court must view the evidence in the light most favorable to the appellee. Borgia v. United States, 9 Cir., 78 F. 2d 550, 555."

E. Weight of Evidence Is a Jury Question.

Normally, the weight of the evidence and the extent to which it was contradicted or explained away by witnesses on behalf of the defendant is exclusively for the jury. The rule is set forth in the homicide case (murder) of

Crumpton v. U. S., 138 U. S. 361, at p. 363.

In the last mentioned case, the evidence appears to have been entirely circumstantial. There were no eye-witnesses to the killing.

At page 363 the Court remarked as follows:

> "There is no doubt that this testimony was sufficient to lay before the jury, and it would have been improper to direct a verdict for the defendant. The weight of this evidence and the extent to which it was contradicted or explained away by witnesses on behalf of the defendant, were questions exclusively for the jury, and not reviewable upon writ of error. If the verdict were manifestly against the weight of evidence, defendant was at liberty to move for a new trial upon that ground; but that the granting or refusing of such a motion is a matter of discretion is settled in Freeborn v. Smith, 2 Wall. 160; Railway Company v. Heck, 102 U. S. 120; Lancaster v. Collins, 115 U. S. 222, and many other cases in this court."

III.

Correct Instructions When the Evidence Is All Circumstantial.

On page 9 of Appellant's Brief is set forth a group of cases. The Government has no quarrel with the rulings announced in any of these cases. It is true that when the evidence is entirely circumstantial, that such evidence must exclude every reasonable hypothesis other than that of guilt and that such evidence must be inconsistent with every reasonable hypothesis of innocence.

The instructions given by the Court in the instant case, upon two separate occasions, announced that principle.

Under the instruction of "reasonable doubt" [R. 7] second paragraph from the bottom of the page, the Court gave such an instruction.

Again under the instruction designated as "circumstantial evidence" [R. 9] the second paragraph from the bottom of the page is noted a similar instruction that the Court gave. It is almost word for word in conformity with this principle of law.

Thus it is seen the Court, on two occasions, clearly advised the jury on this proposition of law.

It is noteworthy that the appellant did not object to any of the above referred to instructions.

IV.

Circumstantial Evidence Sufficient to Support a Verdict of Homicide.

There is no question but that circumstantial evidence is sufficient to support a verdict of homicide. In all cases, depending entirely upon circumstantial evidence, there must be "proper", "legal", "competent" or "substantial" evidence sustaining the charge and such evidence must be inconsistent with every reasonable hypothesis of innocence.

As an illustration of a case affirmed by the Supreme Court of the United States where the testimony was entirely circumstantial pertaining to the guilt of the defendant charged with murder, we cite that of

Perovich v. U. S., 205 U. S. 86,

where on page 89 the facts of the case, which were rather unusual, are discussed and the Court in referring to the *extreme circumstantial nature* of the case, among other things, stated the following (page 89):

> "The testimony in the case was circumstantial. No witness saw the killing. Indeed, the first and principal question is whether there was a homicide * * *."

We refer to the above case because it is obvious that in all cases where there are no eye-witnesses that each case must be decided upon its own facts. In some, the circumstantial evidence is weaker than in others. But if such evidence is "proper", "legal", "competent" or "substantial" (*Maugeri v. U. S., supra*), then we believe the true rule is that the Appellate Court should not set aside the verdict of the jury and substitute its views therefor.

See, also:

Morton v. U. S. (C. A. D. C.), 147 F. (2d) 28—

a homicide case—where the evidence was also entirely circumstantial. In the *Morton* case, the Court also holds that the verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the government. On pages 29 and 30 appears the following:

> "Although the evidence as to appellant's participation in the crime was circumstantial, it was clearly sufficient—if admissible—to support the verdict of the jury. Convictions have been upheld upon much less conclusive evidence. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it."

See, also:

McAffee v. U. S. (C. A. D. C.), 111 F. (2d) 199, cert. den. 310 U. S. 643 (a murder case).

It is apparent that the instant case must be decided upon a careful reading of the evidence, and all logical and reasonable inferences deducible therefrom in determining whether there was a sufficiency of such evidence.

V.

Argument.

(1) Discussion of the Evidence.

In view of the authorities previously cited, it is respectfully submitted that the evidence was sufficient to support the jury's verdict.

Appellee shall briefly discuss certain of the testimony offered.

(a) *The Witness Harry Maxwell Zents:*

Zents was the second mate. So far as the pertinent features of this crime are concerned, he testified that he saw the Captain, the deceased, at dinner at about 5:00 the night of the homicide; that the Captain appeared to be sober. [R. 54.] (There was no other testimony to the contrary as to the Captain's sobriety.)

The witness Zents testified that the cabins of the ship were all amidship. [R. 54.]

Zents testified that while he was in his room on the night of December 9, that at either 9:00 or fifteen minutes past 9:00, he heard certain shots ring out. [R. 55-56.] Zents explained, by using Government's Exhibit No. 2, where he was at such time, namely, in his, the second mate's quarters on the deck below that where the Captain's body was later found. [R. 56.]

The witness testified that as soon as he heard the first burst of shots as follows: "I jumped up and was in the passageway when I heard the second burst, that is in the passageway immediately outside my room on the boat deck." [R. 56.] Zents then testified that when he heard the second burst, he knew that they had come from the

deck above and ran up the stairs, indicating the stairs as being "C3" a mark so placed by the witness upon Government's Exhibit No. 2. Zents explained that that was one of the most accessible means of getting from the deck he was on to the deck above. The witness then explained that he saw Mr. Kennon, the purser, at the top of the stairs or upon the same deck as those of the Captain's quarters.

Zents stated that it was within 20 or 30 seconds after he had heard the first volley of shots that he saw O'Leary in the doorway leading into the Captain's quarters, and indicated such position as "B" Government's Exhibit No. 2. [R. 58.] Prior to this, the witness had testified from Government's Exhibit No. 1 that he, Zents, had proceeded from point marked "A" to point marked "C" where he saw Mr. O'Leary at or near the point "B", and that he saw O'Leary standing in the doorway, and that the doorway was open. The witness testified at that time he, the witness, was from 12 to 14 feet away from the defendant, Mr. O'Leary. [R. 57.]

The witness testified that when he saw Mr. O'Leary at point "B" standing in the doorway of the Captain's office that he heard O'Leary make the following remark: "This will hold you for a while." [R. 57.]

The witness then stated that after he had seen Mr. O'Leary at point "B" that he, the witness, retraced his steps from where he was, namely, point "C" to point "A". [R. 59.] It was then that he heard the voice of the Chief Engineer, Mr. Noble. [R. 59.] Zents testified that up to this time he had not seen the condition of the Captain, and did not know whether the Captain had been killed or not. That while he was at point "A", Mr. O'Leary and

Mr. Noble walked by him. [R. 59.] Thereafter he went into the Captain's office and saw the Captain sitting in a settee, bent over with his arms almost down to the deck. That no one else was near the quarters at that time, that he saw blood and saw the gun by the right foot of the Captain. The gun, Government's Exhibit No. 6, was then offer and received into evidence. [R. 60.] The witness testified that he had seen O'Leary with a pistol of similar character as Government's Exhibit No. 6 after the ship had left the Canal. [R. 60.] The witness stated that an investigative body from another ship came aboard about 20 minutes after 10:00 of the date of the homicide and that it consisted of seven or eight persons.

Effort was made to impeach the testimony of the witness Zents. This impeachment commences on page 66 of the Transcript. It is respectfully submitted that an examination of the record will negative any impeachment, but rather will show that the witness was but confused as to the cross-examination. It is further submitted that the weight, credibility and the impeachment or not of the witness Zents was a matter exclusively for the jury.

The witness Zents then testified that he observed one of the naval officers *wrap* a handkerchief around the pistol. The testimony was as follows:"It was shortly thereafter that the gun was picked up off the floor and wrapped in a handkerchief by the Chief Boatswain * * *." [R. 73.] That later two other guns were found in the file drawer in the Captain's office. [R. 75.]

(b) *The Witness James M. Kennon:*

Kennon was a young man of 20 years of age, this was his first voyage as a purser. [R. 91.] Kennon explained that his quarters were directly behind the Captain's quarters on the same deck. That in order for him to get from his quarters to the Captain's office, he was compelled to go around the passageway to the opposite side of the ship and then head back toward the Captain's office. [R. 91.]

The witness Kennon stated that in the vicinity of 9 o'clock, while he was sitting in his quarters, he heard a bursts of shots with an interval of two or three seconds then another burst. After hearing the last shot, he started around the passageway, and that when he came to point "A" Government's Exhibit No. 1, he saw the first mate, the defendant, at which time he was not sure whether the defendant was coming around from point "C" or whether he was at the head of the stairs. [R. 92.]

Kennon then stated the defendant turned around and started towards the Captain's door which was indicated by point "B" and that he, the witness Kennon, followed shortly behind him and after arriving at point "B" (the defendant) "he either deliberately blocked the door or he fell over, I don't know which. I tried to see into the room, but was unable to." [R. 92.] The witness stated that the defendant then turned around and that he, Kennon, was then able to see in the room, where he saw the Captain on the settee slumped over with a gun at his feet. The witness then stated "I am not certain what I did after that incident," and stated that he was considerably excited. [R. 92 and 93.]

The witness further testified concerning the apparent death of the Captain. The witness then indicated that he had seen the Captain on many occasions at point marked "W-1" of Government's Exhibit No. 1. [R. 93.] Kennon stated that during this incident the second mate Zents was with him when he was close to the Captain's quarters, or that he had seen him near at that time but that he was confused and did not know definitely whether the second mate Zents was with him "when the three of us walked back" (towards the Captain's office), although it was his impression at that time that the second mate Zents was on the other side of him. [R. 94.]

Kennon testified that according to the inventories, there were three guns assigned to the ship [R. 95] and that they were kept in a file cabinet in the Captain's office and that he saw one gun at the Captain's feet and saw two other guns in the drawer.

(c) *The Witness Arthur Noble:*

The First Engineer, Noble, testified that almost every day he had seen the Captain at the point marked "W-1" on Government's Exhibit No. 1. [R. 97.] That the night of December 9 was a warm summer evening. Noble stated that he had heard the burst of shots and that within a minute or two after, the purser had come to him and told him the Captain was shot. That he had seen the body lying in the Captain's office [R. 97]; that he had seen Mr. O'Leary at the starboard passageway at a point which he marked as "Z-1" Government's Exhibit No. 2 [R. 97] and as he passed Mr. O'Leary they were facing each other. Upon doing so, he said "My God, Frank, haven't you done enough harm already?" [R. 98.] (The

witness referred to the defendant as Frank.) The witness Noble did not recall the defendant making any reply to the utterance he had directed toward him.

The witness stated that he had seen the Captain on the bridge a number of times in his pajamas. [R. 99.]

(d) *The Witness James Travis Cooper:*

Cooper was the Third Engineer. Cooper testified that a few moments prior to the firing of the shots that had killed the Captain, he and the defendant O'Leary had had a quarrel or an argument, and that the same had taken place at a point marked by an "X" and later "C-1" on Government's Exhibit No. 2. [R. 42 and 45.] Cooper testified that during the argument with the defendant, O'Leary, the defendant had said that he was going to try to make him, the witness, go back over to the other side of the ship, and that O'Leary had said "some words about a gun." Cooper stated that his recollection was that the defendant had said that if he had a gun he could make me, or he would get his gun and make me—something like that. [R. 42.] The witness considered O'Leary to have been intoxicated. The witness stated that after this incident with Mr. O'Leary, Mr. O'Leary had gone beyond his vision through a door. [R. 43.]

(e) *The Witness Lewis Thomas Watson:*

Watson, a seaman, testified that he was on the deck immediately below and about 40 feet to the rear from where he had seen the defendant, O'Leary, and the Third Engineer Cooper having an argument, which was where he had seen Mr. O'Leary push Mr. Cooper. [R. 48.] That after the incident, Mr. O'Leary walked away, that he, the witness, was on the main deck, Mr. O'Leary and

Mr. Cooper being on the boat deck, the deck above. The witness Watson testified that he saw a figure up on the bridge opposite or close to the chart room, or wheel house [R. 48-49] but that it was dark and he could not see very well and did not know who this was.

It is submitted that this "figure" was that of the Captain, and that the Captain, while at this point, was observing the quarrel between his first mate, the defendant, and the Third Engineer, Mr. Cooper.

Watson stated that it was about three to five minutes after he saw Mr. O'Leary walking away from the argument with Mr. Cooper that he had heard the shots, at which time he, Watson, was in the gangway on the port side, that is the left side of the ship. [R. 48.] The witness further testified that when he saw the defendant first leave just prior to the shooting, Mr. O'Leary had gone through the passageway in the direction of his cabin, and was, at that time, on the deck which was one deck lower than the Captain's cabin. [R. 50.]

The witness testified that from the time he had seen Mr. O'Leary leave that he, the witness, had walked towards his quarters, made a stop in his quarters, and then gone to the point of the gangplank on the port side from whence he heard the shots ring out. [R. 50 and 79.]

(f) *The Witness Charles William Dunn:*

This witness, a seaman, together with a Mr. Meacham, also a member of the crew, had been ordered to stand over the defendant O'Leary after the defendant was taken into custody. [R. 89.] Dunn testified that he noticed a stain on one of the defendant's arms, that it was red, the color of blood, that he thought it was blood and that the

smear was a few inches long and maybe two inches wide. [R. 89 and 90.]

The government submits that the bloodstain so noted on the defendant's arm could readily have resulted from drops of blood bleeding from the mortally wounded Captain as the defendant was in the act of placing the gun near the feet of the Captain, the deceased.

(g) *The Witness Willie Vance Hamer:*

This witness stated that he was the third mate, and he was asleep at the time of the shooting. [R. 82.] That upon three occasions between Panama and Balboa, he had seen Mr. O'Leary with a pistol, which appeared to be a black looking pistol. [R. 83.]

Hamer further testified that the point "W-1" that had been placed on Government's Exhibit No. 1 is the wing of the bridge. [R. 85] and that he had seen Captain Fithian a number of times on the wing at "W-1" and that almost every day the Captain would go out there and look around. [R. 86.] The witness further pointed out that a person could obtain a good view of the starboard side of the ship from that point. [R. 86.]

(h) *Witnesses Who Had Previously Seen the Defendant With a Gun:*

At least five officers or members of the crew testified to having seen the defendant, O'Leary, with a gun. One stated that the gun they had seen O'Leary with was silver-plated. That is the witness Watson. [R. 80.]

Other witnesses who testified that they had seen O'Leary with a gun of the character of that found at the foot of the Captain are the following: the witness Zents [R. 60]; the witness Hamer [R. 83]; the witness Meacham [R. 88]; the witness Noble [R. 97.]

VI.

Reply to Certain Contentions Urged by Appellant.

Note: In the following portions of this brief, appellee's reply to but certain matters should not be construed as an admission of merit as to other contentions urged by appellant, but not now separately discussed.

It is the position of the appellee that the evidence was and is sufficient. That no useful purpose would be served in minutely replying to all contentions urged.

In this brief, effort has been made to reply to the most salient contentions urged by appellant.

(1) Absence of Evidence as to Fingerprints.

On pages 15 and 16 of Appellant's Opening Brief, there is a discussion to the effect "Absence of Evidence as to Fingerprints." Appellant cites the case of *Hung You Hong v. U. S.* (C. C. A. 9), 68 F. (2d) 67. It is respectfully submitted that the theory of law announced in the above case does not apply to the instant one. A reading of the *Hung You Hong (supra)* case reveals that on a deportation proceeding under the Chinese Exclusion Act, the appellant, although privileged to take the stand and give matters which he could readily have given in support of his position, had refused so to do, and that appellant had otherwise suppressed evidence which he could have readily offered. Hence, of course the doctrine of the production of weaker evidence when stronger might have been produced, readily applied to that case.

In the instant case, appellant now argues because the government failed to introduce evidence pertaining to the existence or non-existence of fingerprints upon the gun,

by failing so to do, the government did have evidence which would be beneficial to the defense. It is apparent that the government did not contend that the defendant's fingerprints were on the gun. At least, there was no evidence to that effect. It is further to be observed from the testimony that there was little likelihood that any fingerprints could be expected to be found. The testimony with respect to picking up the gun clearly reveals that inexperienced hands were present in endeavoring to preserve any possible latent fingerprints. When the gun was picked up it was *"wrapped in a handkerchief,"* the *wrapping* of which would more than likely eradicate any possible existing fingerprints. [Test. Zents, R. 73]:

> "That night, I observed one of the naval officers wrapping a handkerchief around one of the pistols and take it away with him; * * *"

To the same effect, pertaining to *wrapping* the gun in a handkerchief [Test. Noble, R. 101] similar testimony also came from the witness Kennon. [R. 95.]

It is also worthy to note that this crime took place in a remote spot, so far as modern facilities for crime detection are concerned. It occurred thousands of sea miles away from the mainland of the United States, likewise thousands of miles from the Hawaiian Islands, namely, in Seadler Harbor, Manus Island of the Admiralty Group. It is doubted whether there were any facilities available for making the necessary examinations of the gun as could have been the case had the crime taken place in a harbor directly off the mainland; and too, the wrapping of the gun in a handkerchief, a mistake upon the part of the officer, was such an act that would probably smudge or eradicate any latent fingerprints that existed.

The writer of this brief has very little knowledge concerning photographic evidence, namely, when latent fingerprints may be expected to be found or when not. The writer understands that the authority that shall be quoted from hereinunder is considered a worthy work upon the subject and has taken the liberty to copy from this authority the following:

"Photographic Evidence
by Charles C. Scott of the Kansas City,
Missouri Bar. 1942.

Chapter 10, Par. 254, p. 254:

Let us consider now the problem of photographing latent fingerprints. You will recall that latent fingerprints are those of such low visibility that they often must be treated with powders or chemical fumes before they can be photographed. The success of development with powder depends upon the amount of perspiration or oily substance in the fingerprint. This in turn depends upon the age of the latent fingerprint. As a rule latent fingerprints are susceptible of development for several days after they are made. Much of course will depend on atmospheric conditions, the nature of the surface to which the print adheres, and the original amount of oily substances in the fingerprint. In any event after discovery the development and photography of latent fingerprints should never be delayed even a few hours for the success of the undertaking depends primarily upon the time element, and if the impression has become perfectly dry any attempt to develop it with powder will result in failure."

It is the position of the government that the objection raised on pages 15 and 16 of Appellant's Opening Brief, namely, the omission to prove the presence or absence of the defendant's fingerprints on the gun is one that is not covered by the authority of the case of *Hung You Hong v. U. S. (supra),* but rather is more parallel to the authority contained in

Morton v. U. S. (C. A. D. C.), 147 F. (2d) 28,

(a homicide case dependent entirely upon circumstantial evidence) in which case, the appellant also urged that there was an insufficiency of evidence. The conviction was sustained.

In the last mentioned case, *Morton v. U. S. (supra),* the defense raised the objection that the government failed to call some witnesses who might have given admissible evidence. The Court distinguished this omission or act upon the part of the government from that of the suppression of evidence of an adverse character and on page 31 comments as follows:

> "Objection is made, on behalf of the appellant, that the Government failed to call some witnesses who might have given admissible evidence. Assuming their availability and the competency and materiality of their testimony, still no error is shown, in the absence of a showing that evidence material to appellant's defense was suppressed. It is necessary in the prosecution of a case that evidence and witnesses be sifted and selected with a view to economy of trial-time and the better understanding of the case by the jury. No useful purpose is served by using a scatter-gun.

> The Government sustains its burden when it presents evidence sufficient to establish the guilt of the accused. This varies with each case, the nature of the accusation, and the defenses advanced by the accused. Process was available to appellant to call additional witnesses if he wished to do so. Skilled lawyers, advised by their clients, make their decisions upon these questions, in view of their familiarity with the facts and the law. It is not the function of appellate courts to retry cases upon the intangibles involved in evidence which might have been, but was not, introduced at the trial."

Appellee reiterates that there is no showing in this case that the government suppressed any evidence. Surely the appellant would not urge that had the government evidence indicating that it had found fingerprints of the appellant upon the gun that it would not have produced such evidence?

(2) Absence of Explanation of Bloody Footprint.

Appellant, on page 17 of his brief, comments that the government failed to explain the absence of a footprint that appeared upon a piece of paper and considers that a significant factor in the case. This testimony came from the witness Zents [R. 74] and it is as follows:

> "After the shooting I observed a piece of paper on the deck of the Captain's stateroom with what appeared to be a bloody footprint thereon. I think one of the naval officers took this into his possession."

It is to be observed that even in this testimony no particular time was fixed as to how long after the shooting the piece of paper which appeared to have a bloody foot-

print on it was observed. An examination of the complete Transcript will show that many persons had been into the Captain's office directly after the shooting. Hence, to conclude that such paper may have revealed the footprint of the defendant is by no means conclusive, for we see the witness Zents and the witness Kennon had both been in the Captain's office within a very few seconds or minutes after the shooting. The witness Noble had likewise been in, and seven or eight Naval officers had come aboard the ship to conduct an investigation [R. 65] and others too had been into the Captain's office.

The witness Noble testified [R. 100] that there were blood stains on the floor around his (the Captain's) feet when I first went in. Noble further testified that there seemed to be very little blood dripping when I felt his pulse [R. 101] and further testified that when he first saw the Captain apparently dead, there was not the amount of blood on the deck of the floor as is reflected in the picture shown to the witness. The witness Noble testified that the additional blood was explained by reason of the fact that medical examiners came aboard and laid the Captain's body out on the settee and the Captain's arms were hanging over the side and the hospital corps men drew blood from one of his arms after which the witness observed the body was quite bloody.

It is thus apparent that it can hardly be argued that the person who perpetrated the killing would have tracked the blood of the deceased upon a piece of paper, within a few seconds after the shooting, for at that time there was very little bleeding upon the deck by the dying Captain. The footprint upon any piece of paper surely was the footprint of one of the many persons who participated

in the investigation, and not that of the defendant. Hence, the failure of the government to introduce evidence on this subject matter should serve appellant no useful purpose.

(3) Lack of Motive.

On page 18 of Appellant's Opening Brief, there is a discussion of lack of ill will or motive. Appellee concedes that no motive was shown. However, it is well settled not only by the case cited by appellant, but by others, that motive need not be shown to sustain a verdict of guilt of homicide.

The Trial Court's instructions were clear upon this proposition [R. 13] under the subject matter of "Motive".

In homicide cases, the Courts have frequently pointed out that while the establishment of motive fortifies the case, yet it is not a necessary prerequisite.

Pointer v. U. S., 151 U. S. 396, p. 413.

The instruction of the lower Court is reflected. The same is very similar to the one given by the instant Court. In passing, a portion of it shall be noted below, at page 413:

> "There is always a motive for every human act that is done by an individual who is sane, but sometimes it is undiscoverable; sometimes it cannot be fathomed; sometimes because of its inadequate character, because of its utter insignificant nature compared with a great offense of that kind, honest men, whose minds and hearts have not been corroded by the commission of crime, overlook it, they pass it by. The law does not require impossibilities. The law recognizes that the cause of the killing is sometimes

so hidden in the mind and breast of the party who killed, that it cannot be fathomed, and as it does not require impossibilities, it does not require the jury to find it."

The Court, on page 414, comments as follows:

"We do not perceive any substantial error of law in what the court said upon the subject of motive. While, as stated, a motive exists for every act done by a person of sound mind, it is not indispensable to conviction that the particular motive for taking the life of a human being shall be established by proof to the satisfaction of the jury. The absence of evidence suggesting a motive for the commission of the crime charged is a circumstance in favor of the accused, to be given such weight as the jury deems proper; but proof of motive is never indispensable to conviction. 1 Bishop's Cr. Pro., Sec. 1107, and authorities there cited. Malice may be presumed from the mere fact of killing, nothing further being shown."

To the same effect:

Hotema v. U. S., 186 U. S. 413 (homicide case).

In the *Hotema* case, the defendant had also been under the influence of whiskey prior to the killing. The Court refers to the elements of motive or the lack of same being shown on page 422 to the Opinion. On page 414 of the Opinion is reflected the Trial Court's charge to the jury as follows:

"* * * In this case it is not material, so far as the question of the guilt or innocence is concerned, that the evidence fails to show any motive for the killing * * *."

(4) Defendant's Intoxication.

On page 22 of Appellant's Brief, argument is advanced that in view of defendant's intoxication prior to the shooting, that there was little likelihood that he could have committed the killing, the argument being, that under his condition, he would not have had sufficient steadiness of aim to be able to fire the six shots found in the Captain's body.

The diagram of the bridge deck [Government's Ex. No. 1] indicates the Captain's office. Witness Noble, the Chief Engineer, testified that the Captain's office was but about 11 by 8 feet in dimensions. [R. 98.] It is to be recalled that when the defendant was first observed, within a very few seconds after the last volley of shots had been fired, that he was leaning into the doorway of the Captain's office at or near the point indicated by "B". [Government's Ex. No. 1.] It is logical to assume that if the defendant were in the Captain's office just prior to this event and shot the Captain that he was but a few feet, possibly not over three or four feet distant from the Captain when the shooting occurred, hence, it would not be miraculous for a person, even under the influence of liquor, to have driven home into the body of the Captain all six bullets. Such would not have required any high degree of markmanship.

While no objection has been interposed to the instruction given by the Court on the subject of *"intoxication"*, in passing, it is worthy to note that the instruction [R. 15-16] was largely modeled after the approved instruction as given in the case of:

Bishop v. U. S. (C. A. D. C.), 107 F. (2d) 297, p. 300.

We mention this because we believe the jury was correctly instructed. Intoxication is no excuse for a crime, it is only material on the question of whether the defendant had formed the necessary or deliberate intent such as the required premeditation in a murder case. The jury was advised that if he was so intoxicated, they might consider that fact in order to determine whether the defendant's mind was capable of that deliberation and premeditation which is necessary to amount to murder in the first degree.

See, also:

McAffee v. U. S. (C. A. D. C.), 111 F. (2d) 199, cert. den. 310 U. S. 643 (a homicide case—murder—where the condition of intoxication is discussed).

Conclusion.

In conclusion, it is respectfully submitted that the Transcript in this case contains sufficient evidence from which the jury could logically infer that the Captain met his death at the hands of the first mate, the defendant, O'Leary.

It is significant to note that the defendant was standing within the doorway of the Captain's office within 20 to 30 seconds after the first volley of shots were fired. One witness heard the defendant at this point, and while the defendant was so standing in the doorway make a remark "This will hold you for a while." [Witness Zents, R. 57.]

The witness Kennon likewise places the defendant within the passageway immediately near the Captain's door within a very short period of time after the last volley of shots were fired.

It is submitted that this testimony, together with the other circumstantial evidence, is "proper", "legal", "competent" and "substantial" evidence from which the jury was justified in finding the defendant guilty of voluntary manslaughter.

It is logical to assume that the "figure" seen by Watson on the bridge at point "W-1" [R. 48-49] on Government's Exhibit No. 1, a place where it would be natural for the Captain to be, was actually the figure of the Captain, that the Captain had a good view of the starboard side of the ship from this point. That he, the Captain, had looked down upon and had seen and heard the first mate, the defendant, arguing with Cooper.

That after this incident, the defendant had come up to the Captain's office and met the Captain. It would have been logical for the Captain to have reprimanded the first mate for his drunken condition. That this probable reprimand had so infuriated the first mate while he was in his somewhat drunken condition, that he lost control of himself, secured a gun from a file drawer in the Captain's office and fired the six bullets into the Captain's body.

It is therefore respectfully submitted that verdict and judgment of conviction should be affirmed.

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